Supreme Court, U.S.
FILED

(1) 98 612 OCT 8 1998

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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RONALD MCCOWN,
Petitioner,
v.
STATE OF KANSAS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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October 8, 1998

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QUESTION PRESENTED

1. Whether the Kansas second degree intentional murder statute, Kan. Stat. Ann. § 21-3402(a) which states that an *intentional* killing is murder in the second degree and the accompanying jury instruction violates due process principles because (1) the statute is vague and overbroad proscribing legal as well as illegal conduct; (2) the statute fails to preserve one's right to his or her presumption of innocence and (3) the erroneous instructions allowed the petitioner to be convicted of second-degree murder without the jury having to find that the State proved beyond a reasonable doubt the petitioner's guilt of each essential element of the crime, particularly malice or its equivalent.

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---

PETITION FOR A WRIT OF CERTIORARI

Ronald M. McCown respectfully petitions for a writ of certiorari to review the April 17, 1998 decision of the Kansas Supreme Court holding that the Kansas second degree intentional murder statute does not violate due process principles.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (App., *infra,* 1a-15a) is not yet reported. The opinions of the district court (App., *infra,* 20a-28a) are unreported.

JURISDICTION

The Kansas Supreme Court entered its judgment on April 17, 1998 (App., *infra*, 2a). The Kansas Supreme Court denied a timely motion for rehearing on June 9, 1998 (App., *infra*, 16a). On August 28, 1998, Justice Breyer signed an order extending the time for filing this petition for certiorari to and including October 8, 1998. (App., *infra*, 17a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

The Kansas second degree murder statute Kan. Stat. Ann. § 21-3402(a) states

> Murder in the second degree is the killing of a human being committed intentionally.

Intentionally is defined in Kan. Stat. Ann. § 22-3201 as

> Conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing," "willful," "purposeful" and "on purpose."

Pursuant to Kan. Stat. Ann. § 21-3211 a person is justified in the use of force against an aggressor

> when and to the extent it appears to him he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force.

STATEMENT OF THE CASE

Procedural History

Petitioner, Ronald M. McCown, was charged with first degree murder on November 19, 1996 along with the victim's former step-son. This charge arose from a homicide at the victim's residence on October 5, 1996. The case was tried to a jury commencing March 26, 1997. The Petitioner relied on the theory of self-defense.

The jury was instructed on self-defense along with first degree murder, second degree intentional murder and the lesser included offenses of second degree unintentional murder, voluntary manslaughter, involuntary manslaughter, aggravated battery and battery. The state district court rejected petitioner's constitutional challenges to the Kansas second degree intentional murder statute. (App., *infra,* 22a). The jury returned a verdict finding the petitioner guilty of intentional second degree murder pursuant to Kan. Stat. Ann. § 21-3402(a).

The district court denied petitioner's post-trial motion again denying among other things petitioner's constitutional challenges to the statute of which the petitioner was convicted. (App., *infra,* 20a-28a). The Kansas Court of Appeals removed petitioner's appeal to the Kansas Supreme Court and on April 17, 1998 the Supreme Court ruled that the Kansas Statute did not violate due process principles while acknowledging that its decision conflicts with rulings in the Nebraska Supreme Court.

REASONS FOR GRANTING THE PETITION

As the Kansas Supreme Court acknowledged (App., *infra,* 9a), its decision in this case conflicts with an entire line of cases decided by the Nebraska Supreme Court. *See, State v. William,* 531 N.W. 2d 222 (1995); *State v. Myers,* 510 N.W.

2d 58 (1994); *State v. Franklin,* 498 N.W. 2d 552 (1992); *State v. Samuels,* 289 N.W. 2d 183 (1980). At the district court level conflicting decisions will continue to proliferate and the need for guidance from this Court is imperative. This case offers a timely and ideal opportunity to provide that guidance. The decision below is erroneous, and the issue that it addresses is important.

I. The Kansas Supreme Court's Interpretation of Kan. Stat. Ann. § 21-3402(a) Conflicts With the Nebraska and Washington Supreme Courts' Interpretation of a Nearly Identical Statute

Prior to 1977, Nebraska defined second degree murder as a killing done "purposefully and maliciously." Neb. Rev. Stat. at 29-402 (Reissue 1975). In 1977, the State of Nebraska adopted their current criminal code which states:

> "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."
>
> Neb. Rev. Stat. at 28-304 (Reissue 1989).

The Nebraska Supreme Court has consistently ruled that despite its absence from the second-degree murder statute malice remains an essential element which must be proved. *See, State v. William,* 531 N.W. 2d 222 (1995); *State v. Myers,* 510 N.W. 2d 58 (1994); *State v. Franklin,* 489 N.W. 2d 552 (1992); *State v. Samuels,* 289 N.W. 2d 183 (1980).

In *State v. Ryan,* 249 Neb. 218, 543 N.W. 2d 128 the Nebraska Supreme Court held:

> A statute is unconstitutionally broad if it proscribes legal as well as illegal conduct. Mens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct. Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Construing the legislative silence of § 28-304(1) as eliminating malice as a material element of second

> degree murder would result in the absurd consequence of an overbroad murder statute making certain legal acts illegal. 543 N.W. 2d at 136-37.

The Kansas Supreme Court while recognizing the Nebraska ruling, held they were not bound by such decisions. (App., *infra,* 9a).

Prior to the adoption of Kansas' current criminal code on July 1, 1992, murder in the second degree was defined as

> "[t]he malicious killing of a human being, committed without premeditation, and not in the perpetration or attempt to perpetrate a felony." Kan. Stat. Ann. § 21-3402, 1992 Kansas Session Laws, Ch. 298.

The current code states that murder in the second degree is,

> "[t]he killing of a human being committed intentionally." Kan. Stat. Ann. § 21-3402(a) (Supp. 1996).

The Kansas Statute, like the Nebraska Statute no longer mentions malice or its equivalent. For instance, under the State of Washington's old criminal code, a killing was murder or manslaughter unless it was "excusable or justifiable." Laws of 1909, ch. 249, secs. 140, 141, 143, pp. 930-31. One of the enumerated justifications for homicide was self-defense. Laws of 1909, ch. 249, sec. 154, p. 934.

In 1975, the Washington Legislature much like the States of Nebraska and Kansas repealed the old criminal code and adopted a new criminal code which omitted that "a killing was murder or manslaughter, unless it was excusable or justifiable." The "excusable or justifiable" language from the definition of homicide was omitted. RCW 9A.32.030; RCW 9A.32.050; RCW 9A.32.060; RCW 9A.32.070. The Washington Supreme Court accepted the plain language of the amended statute. Washington defines "intent" as acting with the objective or purpose to accomplish a result which constitutes a crime. *See, State v. McCullum,* 98 Wash.2d 484, 656 P.2d 1064 (1983). The

Washington Supreme Court held that, given the Washington statutory definition of intent, a person acting in self-defense cannot be acting intentionally as defined by Washington statutes.

Neither Nebraska nor Kansas follows Washington statutory law. In Kansas and Nebraska intent is acting willfully or purposefully. The Kansas definition of intent does not resolve the ambiguities left by the silent omission of the element of malice in the printed language of Kan. Stat. Ann. § 22-3201.

The defendant bears the burden of "bringing up" self-defense but by only saying the killing must be intentional the State has been relieved of its obligation to prove that the defendant's use of force was unlawful. The jury was not instructed that to convict the petitioner it must find beyond a reasonable doubt that the killing was not either excusable or justifiable.

In repelling an attack one is limited to "that force which reasonably appears to be necessary for that purpose." *State v. Blocker,* 211 Kan. 185, 192, 505 P.2d 1099 (1973). If the jury had found the force employed by the petitioner – as opposed to the force applied by the co-defendant – was 'reasonably necessary' to repel the deceased's attack, it would have acquitted him. But if it found that force excessive what could its verdict have been? The jury found no premeditation and presumably following instructions they moved to the next instruction. If it had been instructed properly that malice or its equivalent was an essential element of second degree murder, the jury could have found the petitioner was willfully doing a wrongful act with a just cause or excuse. Where no malice is found one cannot be convicted of second degree murder. If the jury found the petitioner used excessive force, the statutory justification was eliminated for the homicide and thereby made it unlawful. The jury could have concluded on the facts of this case that the petitioner had a right of self-defense and his exercise of that right was a lawful act. It could also find,

however, that some of the injuries the deceased sustained were not reasonably necessary and attributed those injuries to the petitioner as opposed to the co-defendant. This use of excessive force could be found to be an 'unlawful' manner of committing the lawful act of self-defense and thus supply that requisite element of involuntary manslaughter. *State v. Gregory,* 218 Kan. 180, 185-86, 545 P.2d 1051 (1975). In the instant case, however, the jury was precluded from moving beyond second degree murder because malice or its equivalent was not included in the second degree intentional murder instruction, thus the jury could not properly consider the self-defense instruction.

II. The Decision of the Kansas Supreme Court Is Erroneous

For decades, Kansas, by statute defined second degree murder as a malicious killing. The term "malicious" is a specific designation of the intent which a defendant must possess in killing a human being in order to be found guilty of murder in the second degree. Malicious is defined as "willfully doing a wrongful act without just cause or excuse." *State v. Stone,* 253 Kan. 105, 843 P.2d 662 (1993). Malice, like general intent, is an element concerning the state of mind of the defendant. The commonly held view in this country is that malice is an essential element of murder in the second degree. *See,* 40 CJS *Homicide* § 64 and 65 (1991). In fact, murder is said to be distinguished from manslaughter by malice. Manslaughter is an offense distinct from and not a degree of murder. "The basic distinction between second degree murder and voluntary manslaughter, other than the penalties is the presence or absence of malice." *State v. Wilson,* 215 Kan. 437, 524 P.2d 224 (1974). The argument was presented to the lower courts that proper statutory construction of K.S.A. § 21-3402 mandates that malice or its equivalent remain an element of second degree murder.

As a general rule, statutes will not be understood as affecting any change in the common law of criminal intent

or state of mind beyond what is clearly indicated. *State v. Jones,* 242 Kan. 385, 748 P.2d 839, 845 (1988). Moreover, omission of the term "knowingly" from a statute defining a crime has been viewed as not conclusive on the question whether or not guilty knowledge was an essential element of the crime. *State v. Robinson,* 239 Kan. 269, 718 P.2d 1313 (1986). Legislative silence as to a mental element in a crime already so well defined in common law and statutory interpretation is not to be construed as eliminating that element from the crime. *See, Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240 (1952); *People v. McNeese,* 892 P.2d 304 (Colo. 1995). The lower court's function was to interpret statutes to effect the intention of the Legislature. *State v. Richardson,* 256 Kan. 69, 77, 883 P.2d 1107 (1994). The Kansas courts are failing to do so when it comes to second degree intentional murder.

The petitioner recognizes, when the legislature revises existing law it generally intends to change the law as it existed prior to the amendment. *State v. Tremble,* 21 Kan. App. 2d 32, 894 P.2d 920 (1995); *see also, C.J.S. Statutes,* § 363. It is of particular importance therefore, in the *instant* case, to note the Judicial Council Comments to Senate Bill No. 358 which amended K.S.A. § 21-3402 in 1992 to read as it does today:

> Second degree murder is divided into two subsections. Subsection (a) covers intentional murders and merely clarifies the statute.
>
> The statutory language is simplified and generally patterned from the Model Penal Code. "Intentionally" is added because it accurately reflects this type of murder and is easily understood. "Without deliberation or premeditation," "not in perpetration or attempt to perpetrate a felony," and "maliciously" are deleted because they are unnecessary and confusing. ***The deletion of the term 'maliciously' is not a substantive revision and is not intended to affect defenses."*** (Emphasis added.) (App., *infra,* 5a-8a).

The petitioner urged the lower courts to consider not only the apparent legislative intent to not substantially change intentional second degree murder and its related defenses, but to also recognize that due process requires that a state criminal statute must be sufficiently explicit in its description of the acts, conduct, or conditions required or forbidden to establish the elements of the offense with reasonable certainty. The standards of certainty in statutes punishing for criminal offenses are higher than in those depending primarily on civil sanctions for enforcement. *State v. Adams,* 254 Kan. 436, 886 P.2d 1017 (1994). Due process of law requires that criminal statutes be clear and that ascertainable standards of guilt be defined with sufficient definiteness. There must be ascertainable standards of guilt, but impossible standards of specificity are not required. Men of common intelligence cannot be required to guess at the meaning of the statute. The test is whether the language conveys a sufficient definite warning as to the proscribed conduct when measured by common understanding and practice. *State v. Penny,* 22 Kan. App. 2d 212, 914 P.2d 960 (1996); *State v. Bryan,* 259 Kan. 143, 910 P.2d 212, 259 (1996).

A statute is unconstitutionally vague or overbroad if it proscribes legal as well as illegal conduct. *See, Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839 (1972). *Mens rea* should apply to each of the statutory elements which criminalizes otherwise innocent conduct. *See, U.S. v. X-Citement Video, Inc.,* 513 U.S. 64, 115 S.Ct. 464 (1994). Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Stone,* 253 Kan. 105, 843 P.2d 662 (1993). Construing the legislative silence of Kan. Stat. Ann. § 21-3402 as eliminating malice as a material element of second degree murder is erroneous because it has resulted in the absurd consequence of criminalizing homicides committed in self-defense. The voluntary manslaughter statute (Kan. Stat. Ann. § 21-3403) punishes those who kill in self-defense, but are determined to have been unreasonable in

their belief that deadly force was justified. However, Kan. Stat. Ann. § 21-3402 could be applied to any unpremeditated intentional killing, including one committed in self-defense, because nothing in the statute requires or implies that the killing be of the kind previously considered "wrongful."

III. The Question Presented Is Important

In *Morissette v. United States,* the defendant was charged with stealing and converting property of the United States in violation of 18 U.S.C. § 641, which statute is silent as to felonious intent. The trial court, over Morissette's objection, did not instruct the jury on felonious intent. This Court noted that the mental element of intent was longstanding and well defined in common law, and thus, the ruling was made that the mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced. This Court described the government's request for a strict statutory construction without reading the element of intent as follows:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative. *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 249 (1952).

This Honorable Court recognized in an analogous case the importance of a criminal statute having evil purpose. The State of Kansas along with other states have begun to erode the immunities of its citizens. Left unchecked

criminal statutes may altogether forego the requirement of guilty intent.

The State of Nebraska has consistently ruled that despite its absence from the actual statute, second degree murder has as one of its essential elements, malice. Unless this Court grants certiorari the State of Kansas will continue to convict individuals of second degree intentional murder absent proof beyond a reasonable doubt that the individual did so with an "evil purpose." Mr. Justice Harlan once stated that it was far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *Mullaney v. Wilbur,* 421 U.S. 684, 703-04, 95 S. Ct. 1881, 1892 (1975).

In sum, the states are in disarray on significant constitutional matters. This case presents an opportunity for this Court to address these matters before more injustice is procured and to bring much needed guidance to this area. Therefore, the Court should grant the petition.

CONCLUSION

Construing Kan. Stat. Ann. § 21-3402(a) as requiring malice or its equivalent was a reasonable way to construe an otherwise unconstitutional statute. Because the Kansas Courts have failed to so rule, the statute must be declared unconstitutional. Absent such a ruling citizens will continue to be denied due process of law. For the above and foregoing reasons, the petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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October 8, 1998

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 79,214

STATE OF KANSAS,
Appellee,
v.
RONALD MCCOWN,
Appellant.

SYLLABUS BY THE COURT

1.

The 1993 amendment to the second-degree murder statute, K.S.A. 21-3402(a) (Ensley 1988), eliminated malice as an element of second-degree murder. Thus, malice is not an element of second-degree intentional murder. See K.S.A. 1997 Supp. 21-3402(a).

2.

Due process requires that the prosecution prove beyond a reasonable doubt all of the elements included in the definition of the offense with which the defendant has been charged. However, proof of the nonexistence of all defenses has never been constitutionally required.

3.

In a prosecution for intentional second-degree murder, the State must prove that the defendant intentionally killed the victim. The State need not prove that such a killing was not done upon a sudden quarrel; in the heat of passion; upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person,

dwelling, or property; or that such a killing was not done in self-defense or in defense of a person, dwelling, or property. However, where evidence is admitted supporting any of those mitigating circumstances, the court must instruct the jury on all such lesser included offenses supported by the evidence.

Appeal from Montgomery district court, JACK L. LIVELY, judge. Opinion filed April 17, 1998. Affirmed.

Melissa A. Kelly, of Heathman & Kelly, of Topeka, argued the cause, and *James C. Heathman,* of the same firm, was with her on the briefs for appellant.

Ann L. Smith, county attorney, argued the cause, and *Carla J. Stovall,* attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

DAVIS, J: Ronald McCown appeals from his second-degree intentional murder conviction. He contends that even though the 1993 legislative amendment to second-degree murder, K.S.A. 21-3402(a) (Ensley 1988), deleted the term "malicious" from the definition of that crime, malice still remains an element of second-degree intentional murder. Thus, he claims that the trial court erred by not instructing on the element of malice and that his second-degree intentional murder conviction must be set aside. We affirm.

A full recitation of the facts in this case is not necessary because the question raised is one of law. Highly summarized, the facts are that the defendant was charged with first-degree murder in connection with the October 5, 1996, homicide of James Douglas, the stepfather of the defendant's roommate, Chad Gaskey. The body of Douglas was found on the living room floor of his home. An autopsy revealed that Douglas had suffered 97 separate wounds, including bruises, abrasions, lacerations, and stab wounds. Death was caused either by a stab wound which severed the jugular vein or a blunt force trauma to the body. A majority of the bruising occurred while the victim was still alive.

The defendant gave two statements to police officers. He first stated that he and Douglas got into a fight, that both he and Gaskey beat Douglas using fists and feet, and that Gaskey stabbed Douglas with a knife. He also stated that he stomped Douglas and watched Gaskey stick Douglas in the throat with a knife.

The district court instructed the jury on first-degree murder and on the lesser included offenses of intentional murder in the second degree, unintentional second-degree murder, voluntary manslaughter, involuntary manslaughter, aggravated battery, and battery. The defendant objected to the instruction regarding intentional second-degree murder on the ground that it did not include the element of malice. His objection was overruled. He raises this same issue on appeal.

In addition to his contention that the trial court wrongly failed to instruct on malice, the defendant argues that the specific instruction involving second-degree intentional murder was defective because it did not separate the phrases "upon sudden quarrel," "in the heat of passion," and "upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person," thereby confusing the jury. However, this argument was not briefed by the defendant and was raised for the first time during oral argument. We, therefore, do not consider this contention of the defendant. See *State v. Patterson,* 262 Kan. 481, 483, 939 P.2d 909 (1997). Moreover, our decision in this case renders the defendant's argument moot.

Discussion and Analysis

Prior to 1993, second-degree murder was defined as "the malicious killing of a human being, committed without deliberation or premeditation and not in the perpetration or attempt to perpetrate a felony." K.S.A. 21-3402 (Ensley 1988). Effective July 1, 1993, the legislature modified murder in the second degree to include both intentional and

reckless killing. The current version of the statute, K.S.A. 1997 Supp. 21-3402, is the version in effect at the time of the crime and incorporates the 1993 amendment. It defines murder in the second degree as "the killing of a human being committed: (a) [i]ntentionally; or (b) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

Notably absent from the current definition of second-degree intentional murder is the term "malicious." In addressing the defendant's argument, we must answer the question whether the legislature intended to eliminate the element of malice from second-degree intentional murder when it deleted the term "malicious" from its definition. This is a question of law involving the interpretation of K.S.A. 1997 Supp. 21-3402(a). Our review is unlimited. See *State v. Robinson,* 261 Kan. 865, Syl. § 1, 934 P.2d 38 (1997).

The legislature in its 1993 amendment specifically deleted the world "malicious" in defining the crime of second-degree intentional murder. The argument that malice remains an element of this crime is thus contrary to the 1993 statutory definition of second-degree intentional murder. K.S.A. 1993 Supp. 21-3402(a). While the language used in the 1993 amendment seems to resolve the question raised, the defendant makes several interesting arguments that must be addressed.

First, the defendant observes that malice under Kansas law is defined as the willful doing of a wrongful act without just cause or excuse and relates to a defendant's state of mind. He notes that in Kansas statutes, as well as at common law, second-degree murder has been defined as a malicious killing. He argues that consistently over the years. "[t]he distinction between second degree murder and voluntary manslaughter is the presence or absence of malice." *State v. Wilson,* 215 Kan. 437, Syl. § 2, 524 P.2d 224 (1974). See *State v. Jensen,* 197 Kan. 427, 417 P.2d 273 (1966), and cases cited therein for an extensive discussion of the element of malice in distinguishing murder and manslaugh-

ter. He argues that malice is so well defined in common law and in Kansas statutory interpretation that legislative silence as to this mental element of malice should not be construed as eliminating malice from the statutory definition of second-degree intentional murder.

In making the above argument, the defendant relies upon the case of *Morissette v. United States,* 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240 (1952). Morissette was charged under 18 U.S.C. § 641 with theft from a government reservation. The statute involved was silent concerning the mental element required for a conviction of larceny. The court, in reversing Morissette's conviction, held that Congressional silence as to mental elements in a statute merely adopting into federal statutory law a concept of crime already well defined in common law will not be construed as eliminating that element from the crimes denounced. 342 U.S. at 262-63.

Unlike *Morissette,* the legislature in this state did not eliminate the mental element of second-degree intentional murder. Our statute is not silent. By expressed action, the legislature deleted the word malicious from the definition of second-degree intentional murder. We agree with the defendant's general observations concerning malice, but such observations do not support a conclusion that the legislature, by excluding the word malicious from the definition in second-degree murder, intended that malice nevertheless remain as element of that offense.

The defendant next points to the only significant legislative history involving the adoption of K.S.A. 1993 Supp. 21-3402, found in the comments of the Kansas Judicial Council on S.B. 358 which contained the amendment. The defendant's contention is best explained by setting forth in full what changes were proposed to the legislature, with comments by the Judicial Council in regard to both first-degree murder and second-degree intentional murder:

"6 *Sec. 3 [On and after January 1, 1993,] K.S.A. 1991 Supp.21-*

3401 is hereby amended to read as follows: 21-3401. ~~(a)~~ *Murder in*

the first degree is ~~premediated murder or~~ *the killing of a human*

being committed:

~~(1) In the perpetration of or attempt to perpetrate any felony;~~

~~(2) in the perpetration of abuse of a child, as provided in K.S.A. 21-3600 and amendments thereto; or~~

~~(3) in the perpetration of, attempt to perpetrate, or as a result of the commission of any felony offense as provided in K.S.A. 65-4127a or 65-4127b, and amendments thereto.~~

~~(b) As used in this section, 'premediated murder' means the killing of a human being committed maliciously, willfully, deliberately and with premediation.~~

~~(c)~~ *(a) Intentionally and with premediation; or*

(b) in the commission of, attempt to commit, or flight from an inherently dangerous felony.

Murder in the first degree is a class A felony.

"Comment

"The two types of first degree murder–premeditated and felony murder–are divided into subsections (a) and (b) respectively. *For all practical purposes, the revisions merely clarify the statute.*

"(a) Premeditated Murder

"The statutory language is simplified and generally patterned from the Model Penal Code. 'Willfully' is replaced with 'intentionally' because the latter term is better understood. 'Deliberately' is deleted because it is redundant. *'Maliciously' is deleted because it is unnecessary and confusing. The deletion of the term 'maliciously' is not a substantive revision* and is not intended to affect defenses. The definition of 'premeditation' is deleted because it is unnecessary."

"24 Sec. ~~34~~. *[On and after January 1, 1993]* K.S.A. 21-3402 is

25 hereby amended to read as follows: 21-3402. Murder in the second

26 degree is the ~~malicious~~ killing of a human being, commited ~~without~~

27 ~~deliberation or premediation and not in the perpetration or~~

28 ~~attempt to perpetrate a felony~~:

29 *(a) Intentionally; or*

30 *(b) unintentionally but recklessly under circumstances manifest-*

31 *ing extreme indifference to the value of human life.*

32 Murder in the second degree is a class B felony.

"Comment

"Second degree murder is divided into two subsections. *Subsection (a) covers intentional murders and merely clarifies the statute.* Subsection (b) is new and covers 'depraved-heart' murders.

"(a) Intentional murder

"The statutory language is simplified and generally pat-

terned from the Model Penal Code. 'Intentionally' is added because it accurately reflects this type of murder and is easily understood. "Without deliberation or premeditation,' 'not in perpetration or attempt to perpetrate a felony,' and 'maliciously' are deleted because they are unnecessary and confusing. *The deletion of the term 'maliciously' is not a substantive revision* and is not intended to affect defenses." (Emphasis added to Comment.)

The defendant argues that the comments of the Judicial Council clearly establish that there was no intent to substantively change the definition of first- or second-degree murder by the deletion of "malicious" from the statute. We disagree; the comments set forth above reveal no such intent. If we were to accept the above comments as the *expressed* intent of the legislature, we would have to conclude that no substantive change was intended and malice remains an element of second-degree intentional murder. However, this is not what the legislature *expressed* by its 1993 amendments to first- and second-degree murder. The plain and unambiguous language of the amendments deletes "maliciously" from first-degree murder and "malicious" from second-degree intentional murder. "When a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. [Citation omitted.]" *State v. Lawson,* 261 Kan. 964, 966, 933 P.2d 684 (1997). Moreover, "[w]hen the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment." *State v. Clint L.,* 262 Kan. 174, Syl. § 2, 936 P.2d 235 (1997). Finally, while the notes and comments of the Kansas Judicial Council may be helpful in determining legislative intent, they are advisory only and to not have the force and effect of law. *State v. Schlein,* 253 Kan. 205, 217, 854 P.2d 296 (1993).

We conclude that under the plain and unambiguous language of K.S.A. 1997 Supp. 21-3402(a), second-degree in-

tentional murder does not include the element of malice, and by reason of the 1993 amendment, malice is not longer an element of the crime in Kansas. The PIK committee, in commenting upon the 1993 amendments to first- and second-degree murder, noted that the elements of the crimes had been changed by the 1993 amendments. See PIK Crim. 3d 56.01; PIK Crim. 3d 56.03.

The defendant cites a line of Nebraska cases that he claims supports his contention that malice is an essential element of second-degree murder and failure to so instruct the jury is error. The defendant is correct that the Nebraska Supreme Court holds that malice remained an element of murder even after that term was deleted from the definition of the crime of murder. See *State v. Williams,* 247 Neb. 931, 938-39, 531 N.W.2d 222 (1995); *State v. Grimes,* 246 Neb. 473, 483-85, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 908-09, 510 N.W.2d 58 (1994). We are not bound by such decisions. We would, however, point to the dissenting opinion in *Grimes* by Justice Wright. See 246 Neb. at 486-94. We believe that his dissenting opinion is the better reasoned position. Finally, we are governed by the plain language of the legislature in its adoption of the amendment to second-degree murder in K.S.A. 1993 Supp. 21-3402(a).

The defendant advances several additional arguments in his attempt to convince us that even though malice has been deleted from the statute defining the crime of second-degree intentional murder, it nevertheless remains an element. He contends that without the element of malice, the statute is vague in that it does not clearly define the standards of guilt, thereby denying him due process of law. The defendant also argues that absent malice, the statute criminalizes homicide committed in self-defense and further results in a shifting of the State's burden of proving every element of the crime charged. He claims that under the statute, the defendant would have the obligation of proving that his act was either justified or excused under the law. The defendant argues that this alleged shifting of the burden of

proof is impermissible under the Due process Clause of the United States Constitution citing *Mullaney v. Wilbur,* 421 U.S. 684, 703-04; 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975).

The above claims by the defendant are without merit. In what was almost an identical claim, the defendant in Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1997), attacked the constitutionality of his second-degree murder conviction. Not unlike Kansas, the New York legislature had eliminated the element of malice from the definition of second-degree murder.

> "In New York there are two elements of this crime [second-degree intentional murder]: (1) 'intent to cause the death of another person'; and (2) 'caus[ing] the death of such person or of a third person. [Citation omitted.] Malice aforethought is not an element of the crime. In addition, the State permits a person accused of murder to raise an affirmative defense that he 'acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse.'" 432 U.S. at 198.

Patterson, much like the defendant in this case, argued that the statute shifted the burden of persuasion from the prosecutor to the defendant, thus violating due process. The United States Supreme Court addressed Patterson's due process concerns as follows:

"We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person, with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does provide an affirmative defense–that the defendant acted under the influence of extreme emotional disturbance

for which there was a reasonable explanation–which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plan enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances.

> "Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [Patterson was] charged.' *[In re Winship,* 397 U.S., at 364[,25l. Ed. 2d 368, 90 S. Ct. 1068 (1970)]." 432 U.S. at 206.

The Kansas Legislature has defined the crime of second-degree intentional murder as the "killing of a human being committed . . . [i]intentionally." K.S.A. 1997 Supp. 21-3402(a). Death of a human being, intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of second-degree intentional murder. The definition of the crime is not vague. Moreover, the legislature left intact all defenses, including justification and excuse, to one charged with the crime of murder. See K.S.A. 21-3208 (intoxication); K.S.A. 21-3211 (use of force in defense of a person); K.S.A. 21-3212 (use of force in defense of dwelling); K.S.A. 21-3213 (use of force in defense of property other than a dwelling); K.S.A. 21-3214 (use of force by an aggressor); K.S.A. 21-3215 (law enforcement officer's use of force in making arrest); K.S.A.

21-3216 (private person's use of force in making arrest); and K.S.A. 21-3217 (use of force in resisting arrest).

In Kansas, we recognize affirmative defenses. However, unlike the New York statute at issue in *Patterson,* we do not require a defendant to establish his or her defense by a preponderance of evidence. Once evidence of self-defense or evidence that the defendant acted with lesser culpability has been raised, the trial court is bound to instruct the jury on self-defense and any lesser included offense raised by the evidence. It is then up to the jury to resolve the question of guilt upon the charged crime. See *State v. Ordway,* 261 Kan. 776, Syl. § 1, 934 P.2d 94 (1997); *State v. Rutter,* 252 Kan. 739, 743, 850 P.2d 899 (1993). The trial court in this case instructed the jury on a whole range of offenses, including murder in the first degree, intentional murder in the second degree, reckless murder in the second degree, voluntary manslaughter, involuntary manslaughter, aggravated battery, and battery. Moreover, the court instructed the jury on self-defense. In addition, the trial court instructed on voluntary intoxication, burden of proof, and self-defense.

The instructions clearly demonstrate that every lesser included offense and all defenses raised by the evidence were presented to the jury and that the instructions did not shift the burden of proof to the defendant.

It should be noted that in its instructions regarding second-degree murder, the trial court relied upon PIK Crim. 3d 56.03, which set forth the elements as:

"1. That the defendant intentionally killed _____;

"2. That it was not done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and] 2. or [3.] that this act occurred on or about the ____day of _____, 19 ____, in _____ County, Kansas."

The notes on use to PIK Crim. 3d 56.03 discuss the use of bracketed element 2:

> "Bracketed element 2 should be added where there is evidence which requires an instruction on voluntary manslaughter. But see *State v. Carpenter,* 228 Kan. 115, 126, 612 P. 2d 163 (1980) (Although premeditation is an element of first-degree murder but not second-degree murder, 'it is not incumbent upon the State to disprove premeditation when there is a malicious killing and defendant has only been charged with second-degree murder.') and *State v. Caldwell,* 21 Kan. App. 2d 466, 901 P. 2d 35 (1995) . . . "

Given the language employed in the 1993 amendment defining second-degree intentional murder as the intentional killing of a human being, we do not believe that bracketed element 2 is required to be given even though there may be evidence which requires an instruction on voluntary manslaughter. Where such evidence is raised, and where there is evidence of the defenses raised, the trial court, as it did in this case, is duty bound to instruct the jury upon those defenses or lesser included offenses. Comments from *Patterson* support a conclusion that the State is not required to prove the negatives set forth in bracketed PIK Crim. 3d 56.03:

> "It is said that the common-law rule permits a State to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. But this has always been the case in those jurisdictions adhering to the traditional rule. It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may

> constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." 432 U.S. at 209.

Much like our state, the New York statute at issue in *Patterson* defined second-degree murder as intentionally killing another person. However, New York, unlike Kansas, required mitigation in the form of extreme emotional disturbance to be raised and established by the defendant by a preponderance of evidence. In Kansas, once evidence of self-defense or other defenses lessening culpability is admitted, the trial court is bound to instruct the jury on the defense or on lesser included offenses raised by such evidence. Failure to do so may result in reversible error and the granting of a new trial. The State, according to standard instructions, must nevertheless prove all elements of the crime by evidence beyond a reasonable doubt. This burden does not require the State to prove the nonexistence of mitigating circumstances set forth in bracketed element 2.

"Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here." *Patterson,* 432 U.S. at 210.

The giving of such an instruction in this case did not prejudice the defendant and, more than likely, was to his advantage.

Affirmed.

McFARLAND, C.J., and ABBOTT, J., concurring in the result.

APPENDIX B

SUPREME COURT ORDER DISTRICT CASE NO. 96CR349

IN THE SUPREME COURT
OF THE STATE OF KANSAS

MELISSA KELLY
HEATHMAN & KELLY
3706 SW TOPEKA BLVD STE 402
TOPEKA KS 66609

STATE OF KANSAS, APPELLEE,
V No. 97-79214-S
RONALD MCCOWN, APPELLANT,

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANT, RONALD MCCOWN. CONSIDERED BY THE COURT AND DENIED.

DATE: 06/09/98.

CAROL G. GREEN
CLERK

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 28, 1998

Mr. James C. Heathman
3706 SW Topeka Blvd.
Suite 402
Topeka, KS 66609

Re: Ronald McCown
v. Kansas
Application No. A-179

Dear Mr. Heathman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on August 28, 1998, extended the time to and including October 8, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
by

Ruth Jones

Ruth Jones
Assistant Clerk

APPENDIX D

21-3401. Murder in the first degree.

Murder in the first degree is the killing of a human being committed:

(a) Intentionally and with premeditation; or

(b) in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto.

Murder in the first degree is an off-grid person felony.

21-3402. Murder in the second degree.

Murder in the second degree is the killing of a human being committed:

(a) Intentionally; or

(b) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life.

Murder in the second degree as described in subsection (a) is an off-grid person felony. Murder in the second degree as described in subsection (b) is a severity level 2, person felony.

History; L. 1969, ch. 180, § 21-3402; L. 1992, ch. 298 § 4; L. 1993, ch. 291, § 19; L. 1996, ch. 158, § 6; July 1.

21-3403. Voluntary manslaughter.

Voluntary manslaughter is the intentional killing of a human being committed:

(a) Upon a sudden quarrel or in the heat of passion; or

(b) upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213 and amendments thereto.

Voluntary manslaughter is a severity level 3, person felony.

History: L. 1969, ch. 180, § 21-3403; L. 1992, ch. 298, § 5; L. 1993, ch. 291, § 20; July 1

21-3404. Involuntary manslaughter.

Involuntary manslaughter is the unintentional killing of a human being committed:

(a) Recklessly;

(b) in the commission of, or attempt to commit, or flight from any felony, other than an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto, that is enacted for the protection of human life or safety or a misdemeanor that is enacted for the protection of human life or safety, including acts described in K.S.A. 8-1566 and 8-1568 and amendments thereto but excluding the acts described in K.S.A. 8-1567 and amendments thereto; or

(c) during the commission of a lawful act in an unlawful manner.

Involuntary manslaughter is a severity level 3, person felony.

History: L. 1969, ch. 180 § 21-3404; L. 1979, ch. 90, § 3; L. 1982, ch. 132, § 2; L. 1992, ch. 298, § 6; L. 1993, ch. 291, § 21; L. 1996, ch. 158, § 2; July 1.

APPENDIX E

DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
SITTING AT INDEPENDENCE

State of Kansas,	)	
	)	
Plaintiff,	)	
vs.	)	Case No.
	)	97 CR-349 I
Ronald D. McCown,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS HAD BEFORE THE HONORABLE JACK L. LIVELY, Judge of the 14th Judicial District of Kansas, at 11:15 a.m., on the 1st day of May, 1997, in Independence, Kansas.

APPEARANCES

For the State: MR. BRET W. LARSON
Assistant County Attorney
300 E. Main Street
Independence, KS 67301

For the Defendant: MR. JAMES HEATHMAN
MS. MELISSA KELLY
Heathman & Kelly
Suite 402
3706 SW Topeka Blvd.
Topeka, Kansas 66609

DEBRA D. OAKLEAF, C.S.R.
Fourteenth Judicial District
P.O. Box 409
Coffeyville, Kansas 67337
(316) 251-6032

THE COURT: Case No. 96 CR 349, State of Kansas vs. Ronald McCown. The State appears by Mr. Lawson. The defendant appears in person and by Mr. Heathman and Ms. Kelly. I believe we're here for two purposes today. The first is the defendant's Motion For a New Trial and if that's denied, then for sentencing. Would that be correct?

MR. LAWSON: That's correct.

THE COURT: Are you ready to proceed, Mr. Lawson?

MR. LAWSON: Yes, Your Honor.

THE COURT: Mr. Heathman?

MR. HEATHMAN: I believe Ms. Kelly's doing that, Your Honor.

THE COURT: Very well. Ms. Kelly? You may remain seated, if you'd like.

MS. KELLY: Okay.

THE COURT: Whatever's most convenient for you. How are you feeling?

MR. HEATHMAN: I'm feeling okay, but sitting's kind of difficult right now.

THE COURT: Get up and walk around any time you want to.

MR. HEATHMAN: Thank you, Your Honor.

MS. KELLY: Your Honor, we did previously submit a motion for a new trail.

THE COURT: Yes, I read your brief.

MS. KELLY: Okay, I won't take much of the Court's time. I'd just like to go ahead and highlight some of the things that we've raised. The first is the defendant feels a

new trial is necessitated by the fact that the Court failed in its instructions to the jury to instruct in its second degree instruction that the killing must be done maliciously, in addition to intentionally, and not done upon a sudden quarrel or in the heat of passion.

THE COURT: Well, this issue was raised at the time we instructed the jury.

MS. KELLY: Yes, it was, Your Honor, and I believe we did object to it.

THE COURT: And I gave the PIK instruction.

MS. KELLY: That's correct.

THE COURT: Very well.

MS. KELLY: But we do feel by omitting malice and going against what the Kansas legislature had stated in its notes that there was not supposed to be any substantive revision nor was its deletion supposed to affect the defense, that Mr. McCown was denied a right to a fair trial.

The statute, without reading malice into it, is overbroad and vague and as a result of failing to require the jury to find malice shifted the State's burden to prove every element of the crime charged to Mr. McCown and he was forced to forgo his presumption of innocence and was required to produce evidence that his actions were indeed lawful. If those -- for that particular reason and the fact that the record conclusively shows that Mr. McCown was convicted of second degree murder without the jury having to find and prove --the State prove beyond a reasonable

doubt the material element of malice, he was denied and deprived a right to a fair trial.

The second also has to do with the same instruction and that was the fact that the burden was again shifted to Mr. McCown to show that the killing was not done upon a sudden quarrel or in the heat of passion.

THE COURT: And you raised that issue. Again, the Court gave the PIK instruction. Did you write the brief or did Mr. Heathman write the brief?

MS. KELLY: I wrote the brief.

THE COURT: I was very much impressed with the brief. In fact, I sent it to the chairman of the PIK committee for review.

MS. KELLY: I appreciate that, Your Honor.

THE COURT: You wrote it?

MR. HEATHMAN: No, I'm just kidding. I won't take credit for it.

MS. KELLY: I guess because you were so impressed then that maybe I should just stop and you'll grant the new trial, is that --

THE COURT: There's a difference between the law and being impressed. I was impressed by your brief. I really was.

MS. KELLY: Thank you, Your Honor.

THE COURT: I thought it was well written and it was quite logical. Unfortunately, it's contrary to PIK.

MS. KELLY: I understand, Your Honor.

THE COURT: So the reason why I sent this to them, one, because I wanted them to see your

work product; number two, I wanted them to revisit the issues which you had raised, to determine whether or not those issues had been resolved. I've not heard back from them, but I did send it to them the day I received it.

MS. KELLY: Thank you, Your Honor. Again, just to go ahead and highlight, the third issue that we raised was that there was insufficient evidence to support his conviction of second degree intentional murder because the State failed to prove beyond a reasonable doubt that Mr. McCown intentionally killed or that he aided in the killing.

The evidence at trial showed that the only cause of the death came from Dr. Christensen and Dr. Mitchell, and according to Dr. Christensen, the cause of death was blood loss secondary to the puncture of the jugular vein. Mr. Mitchell was unable to state whether the blunt force injuries themselves, absent that injury, would have resulted in death.

And even attributing every blunt force injury to Mr. McCown, there's insufficient evidence to show that he was the one that killed Jimmy Douglas. And for the jury to conclude otherwise, we have inferences upon inferences and that's insufficient to convict him of second degree murder.

THE COURT: Sounds like you're discounting some of the testimony of several of the witnesses.

MS. KELLY: Such as whom, Your Honor?

THE COURT: The young man that was in jail at the time. The young man that was the -- with the Montgomery County Department of Corrections.

MR. LAWSON: That's Tony Benson and Steven McGinnis.

THE COURT: Uh-huh. I think you're forgetting some of the testimony of Detective Sewell and the testimony of Chief McEachin. I understand from your perspective the basis upon which you are making that argument, but if you take three steps back and you look at the overview of all of the testimony of all of the witnesses, the Court believes now, as it did then, that the State had proven -- I don't mean to interrupt you.

MS. KELLY: No, that's fine.

THE COURT: Had proven the elements and the jury properly decided the issue. I understand your position and why you have to take that, but I think when you listen to all of the testimony -- and that, of course, is what the Court's required to do in reviewing a motion for new trial -- I think there's ample evidence to show that he did intentionally kill or that he aided in the killing, which made it a jury question and one which they returned a verdict.

MS. KELLY: Your Honor, even taking all those things into consideration, we feel that there was enough confusion and discrepancy in the testimony that it was not clear who inflicted the fatal wound upon Mr. Douglas. There were two defendants there, two people there at least part of the

time. There was also evidence that our client, Mr. McCown, left the scene before many of the wounds were inflicted and we feel there's insufficient evidence to support that he did the killing.

THE COURT: I understand your position and why you have to make the argument. I don't necessarily agree with you.

MS. KELLY: Okay, Your Honor. And just finally, we do feel that Mr. McCown's statements to Detective Sewell were not voluntary, he was intoxicated at the time. He had been deprived of sleep.

THE COURT: He had been deprived of sleep? I thought they woke him up.

MS. KELLY: Well, they woke him up, but he hadn't had a lot of sleep apparently. Looking at the timetable of when he was arrested and brought in and when he slept, we just feel that there was --

THE COURT: I understand your position. I don't necessarily agree with it, but I understand.

MS. KELLY: We feel that any one of those reasons is enough to grant Mr. McCown a trial or at the very least the totality of the errors of the trial court would be enough to grant Mr. McCown a new trial and we would respectfully request that.

THE COURT: Mr. Lawson?

MR. LAWSON: Your Honor, I'm going to be real brief. I haven't supplied the Court or counsel with a response to the defendant's motions. There's just a few things I would like to say as far as issues one and two.

They're similar in that they're objections to jury instructions and what the jury might have done with those instructions.

If you recall, Your Honor, the Court overruled one of my requests for an instruction -- or denied my request for an instruction and I believe the Court's rationale was that you were going to be following the PIK instructions which are given to the jury and my understanding is that those instructions were followed. And for that reason, I don't believe that there is error here. Certainly not error that would amount to granting a new trial.

The third issue is insufficiency of the evidence. I think the record, as far as the jury is concerned, is clear. They were deliberative. They obviously did not find that I had proven premeditation beyond a reasonable doubt and they went to the next, which is second degree intentional murder. And I think the way they deliberated and the decision they made shows that they clearly weighed the evidence and I think the record contains ample evidence that proves beyond a reasonable doubt that Mr. McCown is guilty of intentional second degree murder. For that reason, I don't believe a new trial should be granted.

And the fourth issue raised by defense counsel is the voluntariness of Mr. McCown's statement. This record is -- this issue has been gone over and over again and I believe the findings the Court made on that is sufficient and I believe the statement was voluntary. For that reason, I would request that the Court deny defense counsel and

the defendant's motion for a new trial and proceed to sentencing.

THE COURT: Ms. Kelly, do you have any additional comments?

MS. KELLY: Your Honor, we'd just like to redirect you to our brief in response to Mr. Lawson.

THE COURT: Well, all of the issues which you have raised in your motion for new trial were issues that you properly raised at the proper time and the Court ruled on those objections at the time. The Court believes that these errors which you raise are not proper issues under the law in that the Court gave the proper instruction for second degree intentional murder.

The Court doesn't believe there is sufficient evidence to support a conviction on the theory that he intentionally killed but he aided in the killing. And last, but not least, the Court does not believe that it erred in failing to suppress Mr. McCown's statement. That statement was voluntary and not involuntary. Therefore, it was properly admitted.

So, therefore, your motion for new trial will be denied and I'll look forward to seeing the Court of Appeals opinion. We need to proceed now for sentencing.